TORKILDSON, KATZ, MOORE,
HETHERINGTON & HARRIS

ATTORNEYS AT LAW, A LAW CORPORATION
700 BISHOP STREET, 15TH FLOOR
HONOLULU, HAWAII 96813-4187
TELEPHONE (808) 523-6000 • FACSIMILE (808) 523-6001

Chamber of Commerce Hawaii
22nd Annual
2015 Hawaii
Employment Law Seminar

August 5, 2015

Breakout Session B2
2:15 – 3:15 pm

Jeffrey S. Harris
Adam W. Wentz
Jennifer L. Gitter

Lessons Learned from the Courts Since 2014

U.S. Supreme Court

1. Retiree health insurance benefits do not vest for life, majority of Supreme Court holds, when collective bargaining agreement provides that retirees “would receive a full company contribution towards the cost of health care benefits,” that the benefits would be provided for the duration of the agreement and that the agreement would be subject to renegotiation in three years; at least where there was no evidence that employers and unions in the industry customarily vest retiree benefits. The benefits could vest under another possible interpretation of the agreement, concurring minority of Supreme Court states, based on retirees' having vested lifetime right to pension benefits, and the agreement saying that retirees will receive health benefits if they are receiving a monthly pension and that surviving spouses will receive the retirees benefits until death or remarriage, as well as industry practices. *M & G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 190 L. Ed. 2d 809, 2015 U.S. LEXIS 759 (January 26, 2015).

2. The U.S. Department of labor did not violate the Administrative Procedure Act by reversing its historical interpretation and concluding that mortgage loan officers did not qualify for the administrative exemption to the overtime pay requirements of the Fair Labor Standards Act. *Perez* v. *Mortgage Bankers Assn,* 135 S. Ct. 1199 (March 9, 2015).

3. A pregnant employee denied light duty could make a disparate treatment claim against an employer who provided light duty to employees who were work injured, disabled or lost their Department of Transportation certificates, unless the employer could offer a legitimate reason for denying her light duty that is not based simply on greater expense or less convenience, and the employer could not show that reason caused significant burden on pregnant workers and was not sufficiently strong to justify that burden. *Young v. United Parcel Service*, 135 S. Ct. 338 (March 25, 2015).

4. A fiduciary has a continuing duty of prudence to monitor and remove imprudent investments from the plan, not only the duty to select them prudently from the outset. *Tibble v. Edison Int'l,* 135 S. Ct. 1823 (May 18, 2015).

5. A bankruptcy debtor who converts from Chapter 13 bankruptcy to Chapter 7 is entitled to return of any post petition wages not yet distributed by the Chapter 13 trustee. *Harris v. Viegelahn,* 135 S. Ct. 1829 (My 18, 2015).

6. An employer violated Title VII because it refused to hire an applicant at least partly because she was wearing a headscarf for what it suspected were religious reasons. In order to hold an employer liable under Title VII of the Civil Rights Act of 1964, an application for employment need only show that the employer's belief that he or she might require a religious accommodation was a motivating factor in the employer's decision not to hire him or her. This is true regardless of whether the employer had actual knowledge that the applicant would require a religious accommodation. The Court additionally held that Title VII creates an affirmative duty to accommodate religious practices, and does not simply demand mere neutrality. *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (June 1, 2015).

<u>9th Circuit</u>

7. Former employee failed to make a prima facie case that counseling for not being found in scheduled work area was discriminatory, because she could not show either that she was performing job satisfactorily despite her not being found, that similarly situated employees outside her protected claim were treated more favorably than her or that the letter of counseling issued for her not being found were adverse. Her discriminatory and retaliatory termination claims failed, because she could not show that the employers legitimate, nondiscrimination reason for terminating her in violation of a policy regarding conflict with passengers was pretextual. *Pulliam v. United Airlines. Inc*., 2014 US App. LEXIS 19351 (9th Cir. Oct. 8, 2014).

8. Isolated references to the terminated employee as an "old dog~ and "crazy Canadian'" were not direct evidence of age or national origin discrimination, because they were ambiguous and not directly tied to his termination. Employee failed to make a prima facie case that termination was discriminatory, because his performance evaluations, written reproofs for disciplinary violations and final incident of insubordination prevented him from showing that he was performing his job satisfactorily or that he was treated differently than similarly situated employees outside his protected classification. He did not show that a supervisor allegedly motivated by discrimination set in motion his termination. None of the other evidence the

employee offered supported his sweeping conclusory allegations of discrimination. *McClain v. County of Clark*, 2014 US App. LEXIS 19353 (9th Cir. Oct. 10, 2014).

9. District Court had jurisdiction over putative class action because the waiting time penalties sought alone exceeded the $5 million threshold for removal. *Jones v. Bath & Body Works, LLC*, 2014 U.S. App. 24508 (9th Cir. Dec. 29, 2014).

10. District court improperly granted summary judgment awarding divorced wife deceased employee's retirement benefits, because written forms re-designating the beneficiary which the employee did not sign were not binding documents governing the plan, and logs showing that employee called to change the beneficiary from the divorced wife to his son from a former marriage could support awarding the son the benefits. *Becker v. Williams*, 2015 U.S. App. LEXIS 1554 (9th Cir. Jan. 28, 2015).

11. A plaintiff asserting a claim to overtime payments must allege that he or she worked more than forty hours in a given workweek without being compensated for the hours worked in excess of forty during that week. *Landers v. Quality Communications, Inc*., 201 5 U.S. App. LEXIS 1290 (9th Cir. Jan. 26, 2015).

12. Court properly decertified wage and hour class action on behalf of unlicensed accountants, because the central issue was whether the discretion they exercised or their work on management policies made them exempt professional employees, as the level of discretion afforded to them varied dramatically from assignment to assignment and some of them worked on management policies. *Brady v. Deloitte & Touche*, 2014 U.S. App, Lexis 19283 (9th Cir. Oct 9, 2014).

13. Court properly granted summary judgment against former employee's disability discrimination and retaliation claims, because he failed to raise a genuine dispute of material fact as to whether the company's reason for terminating his employment was pretextual. *Hooker v. Parker-Hannafin Corp*., 2014 U.S. App. Lexis 19223 (9th Cir. Oct 8, 2014).

14. Court properly granted summary judgment against former employee's racial and disability discrimination and retaliation claims because she failed to raise a genuine dispute of material fact as to whether the company's legitimate reasons for its actions were pretextual. Court properly granted summary judgment on employee's hostile work environment claim because she failed to raise a genuine issues of material fact as to whether she was subject to conduct that was racially motivated in nature, and whether the conduct was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment. Court properly granted summary judgment on employee's failure-to-accommodate claim because she failed to raise a genuine issue of material fact as to whether she was denied a reasonable accommodation and the creation of a new job was not required. *Taylor v. Dept of the Air Force*, 2014 U.S. App. LEXIS 19216 (9th Cir. Oct 8, 2014).

15. Equal Employment Opportunity Commission eliminated the need for an order requiring it to keep subpoenaed information confidential pending investigation of a charge, by conceding on appeal that during the investigation the complainant would not receive any of the subpoenaed information. *EEOC v. Basha's, Inc*., 2914 U.S. App. LEXIS 19132 (9th Cir. Oct, 7, 2014).

16. District court improperly granted summary judgment against prisoner's employment discrimination claim under the Rehabilitation Act, because the prisoner raised a genuine issue of material fact as to whether the penitentiaries' reasons for not hiring him were solely by reason of his disability. *Chavers v. Holbrook*, 2014 U.S. App. LEXIS 19144 (9th Cir. Oct, 7, 2014).

17. Court improperly granted the NLRB Regional Director's request for a preliminary injunction requiring an employer to reopen its repair facility, reinstate employees and bargain with the union on behalf of the employees. The Court abused its discretion by not giving serious consideration to the disruption its reopening order would cause the employees formerly located at the facility, most of whom had already accepted relocation options or severance packages. The Court also failed to meaningfully evaluate the injury to the employer from being required to reopen a facility that was and would be unprofitable due to the loss of its major customer. The Regional Director could instead protect the integrity of the bargaining process and the NLRB's remedial power by obtaining reinstatement, back pay and bargaining with the union regarding the closure decision, if the NLRB concluded that the employer closed the repair facility because of anti-union animus instead of economic motivation and the Court of Appeals enforced hat decision. *Overstreet v. Gunderson Rail Services, LLC*, 2014 U.S. App. LEXIS19800 (9th Cir. Oct. 16, 2014).

18. District court did not abuse its discretion by excluding evidence of allegedly discriminatory decisions by a prior director that were not the proximate cause of the current director's decisions not to promote and to discharge the professor for not having active grant support and the current director treated other professors who did not have active grant support similarly. *Gaur v. City of Hope*, 2015 U.S. App. LEXIS 54 (9th Cir. Jan. 5, 2015).

19. District court improperly remanded putative class action claiming employer misclassified truck drivers as independent contractors and committed other labor law violations, because the employer relied on a reasonable chain of logic and presented sufficient evidence to show that the amount in controversy exceeded $5 million. *Lacross v. Knight Transp.,* 775 F.3d 1200 (9th Cir. Jan. 8, 2015).

20. Court of Appeals remanded putative class action claiming employer committed labor violations to district court with instructions to allow both sides to submit evidence related to whether the amount in controversy exceeded $5 million and that if any controverted amount position included assumptions then the chain of reasoning and the assumptions needed some reasonable ground underlying them. *Ibarra v. Mannheim Investments, Inc*., 775 F.3d 1193 (9th Cir. Jan. 8, 2015).

21. District court properly required disability insurance company to pay employee benefit plan attorneys fees, when the plan asserted that the insurance company wrongfully denied employee benefits under policy and the plan's efforts were more than minimally responsible for settlement in employee's favor. *Micha and Sun Life Assurance Co. of Canada v. Group Disability Benefits Plan for Gynecologic Oncology Assoc. Partners, LLC*, 2015 U.S. App. LEXIS 646 (9th Cir. Jan. 15, 2015).

22. Plaintiffs stated wage and hour claim by identifying tasks for which they were not paid and alleging that they regularly worked more than eight hours in a day and 40 hours in a week. *Boon v. Canon Business Solutions*, 201 5 U.S. App. LEXIS 2449 (9th Cir. Feb. 18, 2015).

23. District court properly granted summary judgment against again applicant's discrimination claim, because vice president's declaration referred to statements by other employees to explain her reason for not hiring the applicant, not to show their truth. *Shields v. Frontier Technology*, 2015 U.S. App. LEXIS 2316 (9th Cir. Feb. 18, 2015).

24. District court properly granted summary judgment against former employees disability discrimination claim and other state law claims, because he failed to raise a genuine dispute as to whether he was disabled, his other claims were substantially dependent on analysis of the labor contract and the court had jurisdiction to enforce his purported settlement agreement *McClain v. Int'l. Assn of Machinists and Aerospace Workers*, U.S. App. LEXIS 2314 (9th Cir. Feb. 13, 2015).

25. District court properly dismissed employee's disparate treatment disability discrimination claim, because employee's inability to seek open positions after a one year eligibility limit upon re-qualification for retirees ended resulted from his decision to pursue re-qualification rather than undergo the ordinary competitive process, not because of his disability. The court properly dismissed employee's disparate impact disability discrimination claim, because he did not allege any group based hiring disparity or specific policy or practice that had a disparate impact on disabled retirees. Extension of the eligibility limit was not a reasonable accommodation because it was not a modification or adjustment to the workplace necessary to enable him to perform the essential functions of the position. *Williams v. Chino Valley Indep. Fire District*, 2015 U.S. App. LEXIS 2236 (9th Cir. Feb. 9, 2015).

26. District court properly enforced arbitrator's award holding that employer did not have just cause for discharge rather than lesser discipline, because collective bargaining agreement providing that violation of rules "would constitute just cause for discipline up to and including discharge did not give the employer discretion to impose any discipline it wished." *Charter Communications, LLC v. Int'l Bhd. Of Elec. Workers*, 2015 U.S. App. LEXIS 2246 (9th Cir. Feb. 5, 2015).

27. District court properly granted summary judgment against former employee's claim that her employer retaliated against her for complaining about sexual harassment, because she offered no evidence showing that the employer's reason for terminating her sexually harassing two coworkers was pretextual and the investigation was in accordance with the requirements for good faith. District court properly granted summary judgment against former employee's hostile work environment claim, because employee did not show management knew that the co-worker harassment was sufficiently severe and pervasive; by offering evidence management's knowledge that some sexual profanity and harassment between co-workers existed, management's statement that "sounds like some of the same individuals from previous investigations, another employee's testimony that sexual profanity was common at the company and employee's complaint about harassment two months earlier. *Alves v. Emerald Corr. Mgmt. LLC*, 2015 U.S. App. LEXIS 2020 (9th Cir. Feb. 9, 2015).

28. District court properly dismissed complaint for termination in violation of Title VII because the former employee did not file a charge with the EEOC within 300 days after his June 2009 termination and he did not allege sufficient facts to show that he was subject to adverse action due to protected activity or status under Title VII. District court properly dismissed complaint for intentional infliction of emotional distress because conduct alleged in the complaint was neither extreme nor outrageous. *Garcia v. Honeywell Aerospace De Mexico SA DE CV*; 2015 U.S. App. LEXIS 1629 (9th Cir. Feb. 2, 2015).

29. An employer was not liable for an employee's sexual assault of a customer, under California law. The assault was due to propinquity and lust and its motivating emotions were not fairly attributable to work-related events or conditions. The employer was not liable for negligent supervision of the employee. There was no evidence that the employer knew or should have known that the employee posed a danger to others. *Ferguson v: Horizon Lines, LLC*, 2015, U.S. App. LEXIS 2858 (9th Cir. Feb. 26, 2015).

30. A District Court did not erroneously grant an employer summary judgment against a former employee's national origin discrimination and retaliation claims, because the former employee failed to raise a genuine dispute of fact as to whether the employer's legitimate, non-discriminatory reasons for actions were pretextual. The Court did not erroneously grant the employer summary judgment on her hostile work environment claim, be-cause she failed to raise a genuine dispute of fact as to whether she was subjected to conduct motivated by her race, national origin or her engaging in protected activity, or whether it altered the conditions of her employment and created a hostile work environment. *Pushbinder v. Brennan*, 2015 U.S. App. LEXIS 2872 (9th Cir. Feb. 26, 2015).

31. A former employee could claim that his employer retaliated because of his whistle-blowing under California law, even though disclosing the information was part of his job duties and his belief was mistaken but reasonable. *Lukov v. Schindler Elevator Corp*., 2015 U.S. App. LEXIS 2936 (9th Cir. Feb. 24, 2015).

32. The District Court erroneously granted summary judgment against an employee's retaliation claim under the Energy Reorganization Act, because the employee offered evidence showing that his subcontractor employer transferred him off a project because the general contractor was unhappy about him raising safety concerns. He had a constitutional right to jury trial for his claims seeking compensatory damages. *Tamosaitis v. URS, Inc*., 781 F.3d 468 (9th Cir. March 4, 2015).

33. The District Court correctly dismissed an age discrimination claim by a pilot who turned 60, five days before the Fair Treatment for Experienced Pilots Act increased the age at which pilots were required to cease flying from 60 to 65. FTEPA was not retroactive and the pilot did not qualify for one of its exceptions. *Weiland v. Am. Airlines, Inc*., 778 F.3d 1112 (9th Cir. March 2, 2015).

34. The District Court did not erroneously grant summary judgment against an employee's discrimination claims based on her termination and encounters that took place several months later, because those claims were not reasonably related to the events the employee described in

her administrative complaint The District Court did not erroneously grant summary judgment against the employee's discrimination claims described in her administrative complaint, because the employee did not offer sufficient evidence that the employer took adverse actions against her, perceived that she had a disability, or terminated her for discriminatory or retaliatory reasons. The employee failed to establish a prima facie case of intentional infliction of emotional distress because the conduct she complained of was not outrageous. *You v. Long's Drug Stores Calif. LLC*, 2015 U.S. App. LEXIS 3209 (9th Cir. March 2, 2015).

35. The District Court erroneously enjoined a strike by aircraft fuelers, because it did not first consider whether the employer who sought the injunction made every reasonable effort to settle the labor dispute either by negotiation or with the aid of any availab1e government machinery or voluntary arbitration. The record showed that the employer failed to make any efforts to settle the dispute. *Aircraft Service International, Inc. v International Brotherhood of Teamsters*, 779 F.3d 1069 (9th Cir. March 10, 2015).

36. A former employee terminated shortly after complaining to her supervisors about discrimination and accounting regularities made a prima facie case of retaliation, but failed to offer any specific and substantial circumstantial evidence showing any dispute over whether the company's legitimate, non-discriminatory reasons for her termination were a pretext for unlawful retaliation. *Lui v. Hewlett-Packard Co*., 2015 U.S. App. LEXIS 4734 (9th Cir. March 23, 2015).

37. An employer responded adequately to an employee's complaint of hostile work environment sexual harassment by its immediate response (interviewing witnesses, confronting the alleged harasser with the allegations and encouraging the employee to take steps needed to ensure her own comfort and health, including paying for her administrative leave while the investigation was ongoing), and permanent remedial steps (not concluding that the alleged harasser engaged in inappropriate behavior or that disciplinary action was warranted, inviting the employee to meet with human resources to discuss alternate arrangements that would limit her possible contact with the alleged harasser, and offering the possibility of working at other facilities in the area). Her effectively petitioning the employer for relief from the harassment prevented her from making a constructive discharge claim. *Nixon v. Catholic Health Initiatives*, 2015 U.S. App. LEXIS 4493 (9th Cir. March 19, 2015).

38. A seaman's claims for conduct aboard a ship owned by the U.S. Maritime Administration but operated by a private company under a contract had such a sufficient maritime connection that they should have been brought against the United States under the Suits in Admiralty Act and the Public Vessels Act. *Ali v. Rogers*, 780 F.3d 1229, 2015 U.S. App. LEXIS 4435 (9th Cir. March 19, 2015).

39. A District Court did not erroneously enter judgment against an employee's discriminatory and retaliatory failure to promote claim, because the employee did not show that he applied for a promotion or the position he applied for, nor did he identify the person who vacated the position or the person who received the position. The District Court did not erroneously enter summary judgment against an employee's claim that the employer discriminated by relocating his disabled parking space, because the change in spaces did not affect the terms, conditions and privileges of employment. District Court did not erroneously enter summary judgment against an employee's claim for discriminatory or retaliatory reduction of hours because the employee showed no link

between the reduction and the employee's request for reasonable accommodation. District Court did not erroneously enter summary judgment against an employee's claim for retaliatory coaching report, because the employer did not use the criticism to substantially and materially change the terms of his employment. *Hardin v. Walmart Stores, Inc.*, 2015 U.S. App. LEXIS 44090 (9th Cir. March 18, 2015).

40. Beneficiaries filed a claim for lost benefits, accrued under ERISA at the time the benefits were denied or when they had reason to know that the claim had been denied. Their claim was barred because they failed to bring their claim within the time provided by the state statute of limitations for actions on written contract and the three year statute of limitations under ERISA for breach of fiduciary duty. *Godes v. Pac. Gas & Elec. Co*., 2015 U.S. App LEXIS 4248 (9th Cir. March 17, 2015).

41. Service advisers who worked at car dealerships were not exempt from the overtime pay requirements of the FSLA as "any salesman, partsman or mechanic primarily engaged in selling or servicing automobile." *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. March 24, 2015).

42. A District Court erroneously granted summary judgment against an employee's disability discrimination claim under California law, because the employee created an issue of fact about whether his disability caused his termination by submitting his own declaration stating that his supervisor told him "if you're going to stick with being sick, it's not helping your situation. It is what it is. You're not getting paid, and you're not going to be accommodated" and to not be concerned about his pay issue because another supervisor said he was "not going to be here anymore" and said "I'm done with that guy." Such self-serving statements may prevent summary judgment if they rest on personal knowledge. The District Court erroneously granted summary judgment against an employee's failure to accommodate and engage in the interactive process claim, because even though the supervisor was willing, to accommodate the employee arriving late, that irritated his supervisor's supervisor, who stated he would not accommodate the employee in the future. *Nigro v. Sears, Roebuck and Co*., 2015 U.S. App. LEXIS 5837 (9th Cir. April 10, 2015).

43. A District Court erroneously granted judgment as a matter of law against a woman firefighter's hostile work environment claims based on the statute of limitations, because her finding a sign on her truck denigrating to women within the statute of limitations was sufficiently related to her finding sign on the women's restroom denigrating to women four months outside the statute of limitations, and the supervisor and other firefighters who allowed the offensive sign to remain on the truck also knew of the offensive the bathroom sign. *Maliniak v. City of Tucson*, 2015 U.S. App. LEXIS 5757 (9th Cir. April 9, 2015).

44. Persons who held legal title to the assets of an employee benefit plan with the intent to deal with these assets solely for the benefit of the members of the plan were "trustees' and their relationship with the members of the plan was a "trust" covered by ERISA, even though the documents that formed that relationship did not use the terms "trustee" or "trust." A plan administrator hired by trustees violated Section 406 of ERISA by paying its own fees from plan assets; the exemption in Section 408 allowing fiduciaries to receive compensation from plan did

not excuse self dealing. *Barboza v. Calif. Ass'n of Prof'l Firefighters*, 2015 U.S. App. LEXIS 5552 (9th Cir. April 7, 2015).

45. A beneficiary' provided no evidence that plan trustees failed to investigate their legal and accounting experts' qualifications, provide the experts complete and accurate information and make certain that reliance on the experts was reasonably justified in violation of their fiduciary duties, when the trustees did not file an IRS Form 990 based on the advice of their legal counsel and accountant. The District Court erroneously failed to decide whether the trustees failed to take those same steps in violation of their fiduciary duty when they relied on the advice of their actuary to structure the plan's reserves in a way that did not maintain solvency. *Barboza v. Calif Assn of Prof. Firefighters*, 2015 U.S. App. LEXIS 5583 (9th Cir. April 7, 2015).

46. A former employee did not timely file a charge with the EEOC as a precondition of bringing a discrimination lawsuit. There was not an exceptional circumstance, such as institutionalization or adjudged mental incompetence under which equitable tolling was appropriate. *Krushwitz v. Univ. of Calif.*, 2015 U.S. App. LEXIS 5581 (9th Cir. April 7, 2015).

47. A District Court erroneously granted summary judgment against an employee's long term disability benefit claim by reviewing an administrator's denial of claim under abuse of discretion rather than a de novo standard, because although the summary plan description for the plan gave the plan administrator discretionary authority to determine eligibility for benefits, the insurance certificate between the employer and insurance was the plan document and did not grant that the plan administrator had that authority. *Prichard v. Metro. Life Ins. Co.*, 2015 U.S. App. LEXIS 6553 (9th Cir. April 21, 2015).

48. A District Court did not erroneously grant summary judgment against a discharged employee's age discrimination and retaliation claims, because the employee did not offer evidence connecting his termination to one discriminatory comment, he had performance issues before reporting the comment to human resources and there was no evidence that the supervisors were aware of his report. *Rey v. C& H Sugar Co.*, 2015 U.S. App. LEXIS 6603 (9th Cir. April 21 2015).

49. A District Court did not erroneously grant summary judgment against a discharged employee's disability discrimination, race discrimination, retaliation or failure to accommodate claims, because he did not show the employer's reasons for his discharge were pretextual the employer terminated the other employee who was allegedly the source of the discrimination and retaliation before it terminated the employee, the employee did not inform the employer of his restrictions or request an accommodation and he was released to work without any restrictions.. *Leatherbury v. C & H Sugar Co.*, 2015 U.S. App. LEXIS 6606 (9th Cir. April 21, 2015).

50. A District Court erroneously granted summary judgment against an employee's disability discrimination claim. There was a dispute of fact whether lifting packages weighing more than 40 pounds unassisted was an essential function of her driver position, because the applicable job description contained statements making it unreliable as a description of the position, the employer provided no evidence as to how often lifting more than 40 pounds was required and the employee's testimony did not estimate the relative time spent on larger as opposed to smaller packages. The employee offered evidence that the employer could accommodate her limitation

by reducing the number of heavy packages in her truck and a collective bargaining provision that all drivers would earn a 'fair day's pay for a fair day's work' did not directly conflict with that accommodation. The District Court erroneously granted summary judgment against the employee's failure to accommodate claim, because the employee offered evidence that she requested modification of the driver position or reassignment, the employer did not show accommodation in conflict with the collective bargaining agreement and there was a dispute of fact whether the employer-could have accommodated the employee by reducing the frequency of heavy packages in her truck. The District Court erroneously granted summary judgment against the employee's failure to engage in interactive process claim, because the employer did not reengage with her after her weight lifting limit changed. *Wright v. United Parcel Serv.*, 2015 U.S. App. LEXIS 6489 (9th Cir. April 20, 2015).

51. A district court properly granted an employer summary judgment against a discrimination claim by a former employee who it laid off and did not rehire, because he was not qualified for the position he sought, the employer was in financial trouble, his lead position was not necessary when the program he was assigned to only had one employee, eliminating his position would result in the greatest savings because he was the highest paid employee and the employee did not show that the employer's financial justification was pretext. The district court properly granted summary judgment against a retaliation claim by the employee, because there was no evidence the employer knew of the employee's complaint to the government before deciding not to rehire him, and even if it did, he did not rebut the employer's legitimate non discriminatory reason for now rehiring him. *Lusk v. Senior Services,* 2015 U.S. App. LEXIS 7889 (9th Cir. May 7, 2015).

52. A district court erroneously denied an employer's motion for a preliminary injunction enforcing a former employee's covenant not to compete under Oregon law. The covenant likely did not suffer from geographical over breadth, because evidence showed that the employee worked in the territory that it reached. The covenant likely did not fail to protect a legitimate interest, because the employee had information about the former employer's marketing plans and product allocation. The covenant was likely enforceable because the employee agreed to it when the employer promoted him. *Ocean Beauty Seafoods, LLC v. Pacific Seafood Grp Acquisition Co., Inc.*, 2015 U.S. App. LEXIS 7646 (9th Cir. May 8, 2015).

53. A district court properly granted summary judgment against an applicant's race discrimination claim because the applicant failed to present evidence creating a dispute whether the decision maker was aware of his race and whether the employer continued to seek applications from other similarly situated individuals outside his class. The district court properly granted summary judgment against the applicant's retaliation claim, because he failed to present evidence creating a dispute whether the decision make was aware of his protected activity. *Stephens v. Nike, Inc.,* 2015 U.S. App. LEXIS 7733 (9th Cir. May 12, 2015).

54. A district court erroneously found that there was no agreement to arbitrate under California law, because the employee signed an acknowledgment that incorporated the employee handbook and expressly referenced the arbitration agreement, the disclaimer of contractual rights only applied to ensure at will employment and the agreement applied to any dispute. The agreement was not unconscionable because it permitted an award of attorney's fees where required by law, it bound the employer to arbitrate and its provision allowing the employer to modify the agreement was subject to the covenant of good faith and fair deadline implied in

every contract. *Ashley v. Archstone Prop. Mgmnt.,* 2015 U.S. App. LEXIS 7975 (9th Cir. May 12, 2015).

55. A district court properly granted summary judgment against an employee's disparate treatment claim, because the employee did not perform satisfactorily by opening an electrical panel in direct violation of company safety policy, while he was not authorized to work on any energized circuits. *Salas v. Indep. Elec. Contractors, Inc.,* 2015 U.S. App. LEXIS 79057 (9th Cir. May 14, 2015).

56. A district court properly granted summary judgment against former plan participants, because their alleged injury could not be traced to any alleged misconduct by the plan or the sponsoring employer and it could not be redressed without excessive speculation. Any breaches of fiduciary duty did not cause material harm to the plan participants that entitled them to damages and they could not make a claim for equitable relief that was tied to a redressable damage claim. *Defazio v. Hollister Emp. Share Ownership Trust,* 2015 U.S. App. LEXIS 8048 (9th Cir. May 15, 2015).

57. A district court erroneously granted an employer's motion to vacate arbitration award, because the arbitrator reasonably interpreted the collective bargaining agreement authorizing him to "interpret, apply or determine compliance" as giving him the authority to impose a remedy for wrongful discharge. *United Nurses of Children's Hosp. v. Rady Children's Hosp. San Diego,* 2015 U.S. App. LEXIS 8228 (9th Cir. May 19, 2015).

58. A district court properly granted a union summary judgment enforcing an arbitration award requiring an employer to comply with a collective bargaining agreement providing that it must preserve all stevedoring work for the bargaining unit, because the bargaining unit employees traditionally performed the work for employers who were members of the multi-employer bargaining association covered by the agreement and the employer had the right to control assignment of work. *Am. President Line v. Int'l Longshore and Warehouse Union, Alaska Longshore Div.,* 2015 U.S. App. LEXIS 8229 (9th Cir. May 19, 2015).

59. A district court properly dismissed a high school teacher's Title VII discrimination claim on behalf of students allegedly mistreated, because the discrimination was not against the teacher. The district court properly dismissed the teacher's hostile work environment claim, because several incidents of racial hostility by students and one by a fellow worker to a student's grandmother outside the teacher's presence were not sufficient to establish a hostile environment. *Pierce v. Santa Maria Joint Union High Sch. Dist.,* 2015 U.S. App. LEXIS 8125 (9th Cir. May 18, 2015).

60. Because last day of plan's 180 day appeal period ran on a Sunday, a claimant had until the following day to file his appeal. *Legras v. Aetna Life Ins. Co.,* 2015 U.S. App. LEXIS 8824 (9th Cir. May 28, 2015).

61. ERISA plans may require employees to execute releases of claims to qualify for and ultimately receive benefits. A voluntary executive severance plan was an ERISA plan because it involved sufficient ongoing particularized, administrative and discretionary analysis. ERISA preempted state contract and wage payment law claims based on the plan release that the

employee signed and his failure to receive benefits. *Edwards v. Lockheed Martin Corp.,* 2015 U.S. App. LEXIS 8840 (9th Cir. May 28, 2015).

62. A district court properly granted summary judgment against an employee's gender discrimination claim on the grounds that she did not show the employer treated a similarly situated employee differently, because the employer received complaints about her conduct with subordinates and the male she compared herself with rejected a proposed separation agreement that she attempted to negotiate. *Ray v. United Parcel Serv.,* 2015 U.S. App. LEXIS 8769 (9th Cir. May 27, 2015).

63. Participants of an employee stock ownership plan stated a claim that fiduciaries of the plan acted imprudently by continuing to provide company common stock as an investment alternative, when they knew or should have known that the stock was being sold at an artificially high price – at least when a court in another action had certified a class claiming that the company materially misrepresented the value of the stock and committed other securities violations. The plan participants stated a claim that the fiduciaries breached their duty of loyalty by failing to provide material information to the participants about the investment in company stock. *Harris v. Amgen, Inc.,* 2015 U.S. App. LEXIS 9695 (9th Cir. May 26, 2015).

64. A pension based on a service related disability is taxable to the extent that the amount is determined by a beneficiary's age or length of service, even though the beneficiary's retirement is occasioned by an occupational injury or sickness. *Campbell v. U.S.*, 2015 U.S. App. LEXIS 9419 (9th Cir. June 5, 2015).

65. For the purpose of the deadline for filing a lawsuit ninety days after receipt of a right to sue letter, the filing date of a complaint is the date it is delivered to the court clerk, whether it is submitted with or without an in forma pauperis application. *Escobedo v. Applebee's*, 2015 U.S. App. LEXIS 9313 (9th Cir. June 4, 2015).

66. A district court must conduct a searching inquiry regarding settlement with an uncertified class, when the class counsel receives a disproportionate share of the settlement, the defendants agree not to object to class counsel's fees and unclaimed amounts of settlement payments to the purported class members revert to defendant. *Allen v. Bedola*, 2015 U.S. App. LEXIS 9139 (June 2, 2015).

67. A city ordinance requiring contractors who operate at the city's airports to pay their employees $14.80 per hour minimum wage of $10.80 per hour minimum wage plus health benefits is not preempted by ERISA, the Airline Deregulation Act or the Railway Labor Act. *Calop Bus. Sys. V. City of L.A.*, 2015 U.S. App. LEXIS 91689 (9th Cir. June 2, 2015).

68. A district court properly granted summary judgment against a postdoctoral fellow's discrimination claim because the fellow did not provide sufficient evidence showing that the reasons for not considering her for a full time position (lack of compliance with safety guidelines and dissatisfaction with her ability to publicly present her work) were pretextual. The district court properly granted summary judgment against the fellow's harassment claim, because she did not cite any evidence showing that her employer knew about several inappropriate comments made by a co-worker. *Choi v. Mabus*, 2015 U.S. App. LEXIS 9784 (9th Cir. June 11, 2015).

69. A district court erroneously enjoined an air carrier to comply with work rules previously agreed to by a pilots' advocacy group during negotiation of a new contract following the National Mediation Board's certification of a union as the pilots' bargaining representative. Since the advocacy group had not demanded recognition from the carrier or sought Board certification, the work rules were not a collective bargaining agreement under the Railway Labor Act. The Act did not require the carrier to maintain the status quo during negotiation of the initial agreement. *Int'l Bhd Of Teamsters, Airline Div. v. Allegiant Air, LLC*, 2015 U.S. App. LEXIS 9506 (9th Cir. June 8, 2015).

70. A district court erroneously granted summary judgment against an employee's federal claim that a supervisor sexually harassed her under the Faragher/Ellerth affirmative defense, because a reasonable jury could find that the employer did not exercise reasonable care to prevent and correct any sexually harassing behavior (including questions whether the employer properly addressed the supervisor's harassment of other employees) and that the employee did not unreasonably fail to take advantage of the employer's offers to correct the situation. The employer was not precluded from raising the affirmative defense because the supervisor was not responsible for the official acts that allegedly resulted in the employee's constructive discharge. *Maggi v. Creative Health Care Servs.*, 2015 U.S. App. LEXIS 10365 (9th Cir. June 29, 2015).

71. An employee plausibly stated a claim for gender discrimination by alleging that a successor employer hired none of the women who worked for the predecessor in her part of the plant, hired many men who worked in that part of the plant and gave a variety of changing explanations for deciding not to hire her, at least one of which was untrue. The employee plausibly stated a retaliation claim by alleging that she and other employees engaged in protected activity against the predecessor, that the successor did not hire them but hired many other employees who did not engage in that activity and that there was communication between the predecessor and successor. *Heneage v. DTE Energy*, 2015 U.S. App. LEXIS 10277 (9th Cir. June 18, 2015).

72. A district court erroneously granted summary judgment against an employee's FMLA interference claim, because there were issues of material fact whether the employee's father had a serious health condition. Being present with father, to make sure he took medication, ate and exercised, and being the sole care provider were protected care. There were issues of fact whether the employer terminated the employee for providing that care. *Aboulhosn v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2015 U.S. App. LEXIS 10121 (9th Cir. June 16, 2015).

73. A union breached its duty of fair representation by favoring one group of pilots who wished to merge seniority lists for pilots of two merging airlines by using their length of service rather than the strength of their respective airlines after taking the place of prior pilots' union that had obtained an arbitration award blending the two competing factors. *Addington v. U.S. Airline Pilots Assn.*, 2015 U.S. App. LEXIS 10858 (9th Cir. June 26, 2015).

74. A district court did not abuse its discretion by refusing to certify a class of employees that an employer allegedly did not pay for time between when they clocked in and started their scheduled shift and from the time when they ended their shift and clocked out, because the employer did not have a class wide policy that prevented all of the employees from using that time for their own benefit. The district court did not abuse its discretion by refusing to certify a

class of employees that the employer allegedly did not pay for work during meal breaks, because the employer provided meal breaks and did not know and should not reasonably have known that some of its employees worked through their meal breaks. *Green v. Federal Express Corp.*, 2015 U.S. App. LEXIS 10500 (9th Cir. June 22, 2015).

75. A district court properly granted an employer summary judgment that an applicant's over-qualification was non discriminatory and non pretextual reason for failing to hire him, because his over-qualification suggested he would not be receptive to training that interviewers thought he needed and his superior management experience suggested he was not a fit for the low level data entry position he applied for with few opportunities for promotion. There was no evidence that acrimony of employer's employees was connected to a protected ground. *Phillips v. Mabus*, 2015 U.S. App. LEXIS 10492 (9th Cir. June 22, 2015).

76. A district court properly granted summary judgment against a former employee's claim that the employer violated Section 510 of ERISA by discharging her for the purpose of interfering with her benefits under a plan, because even though she established a prima facie case by showing her discharge occurred 18 months before she would have been entitled to additional benefits under the plan, the employer articulated a legitimate, non discriminatory reason for termination her (her violation of the company's confidentiality policy by accessing her then-husband's medical records 12 times and another person's records more than once) and she did not present any evidence that the reason was a pretext for a discriminatory motive. *Cole v. The Permanente Med Grp*., 2015 U.S. App. LEXIS 11346 (9th Cir. July 1, 2015).

77. A district court properly granted summary judgment against a former employee's retaliation and hostile work environment claims, because the employ failed to raise a genuine dispute of material fact that the employer took any adverse action against her for engaging in protected conduct or that she was subjected to sufficiently severe or pervasive conduct. *Garner v. Prtitzker*, 2015 U.S. App. LEXIS 11357 (9th Cir. July 1, 2015).

78. There are only two requirements in order for a whistleblower to be an "original source" who may recover relief under the False Claims Act: (1) before filing the action, the whistleblower must voluntarily inform the government of the facts which underlie the allegations of the complaint; and (2) the whistleblower must have direct and independent knowledge of the allegations underlying the complaint. It does not matter whether the whistleblower also played a role in the public disclosure of the allegations that are part of his suit. *US ex. Rel. Hartpence v. Kinetic Concepts, Inc*., 2015 U.S. App. LEXIS 11463 (9th Cir. July 1, 2015).

79. The False Claims Act required dismissal of a qui tam relator's claims because he was convicted of the conduct giving rise to the fraud, even if he or she only played a minor role. *Schroeder v. CH2M Hill*, 2015 U.S. App. LEXIS 12287 (9th Cir. July 16, 2015).

80. A district court properly dismissed a former employee's sex and age discriminations claims against an Oregon company based on lack of personal jurisdiction and forum non conveniens, because the alleged discrimination occurred in the Netherlands, the contact between Oregon and the plaintiff's employer, a foreign subsidiary of the company, was insufficient to support personal jurisdiction in Oregon, and because the plaintiff did not show that the subsidiary was an alter ego of the company. The Netherlands provided a more convenient forum

than Oregon, and the Dutch Equal Treatment Commission was an adequate alternative forum and had already considered and rejected the plaintiff's claims. *Ranza v. Nike, Inc.*, 2015 U.S. App. LEXIS 12290 (9th Cir. July 16, 2015).

81. A district court properly granted summary judgment requiring an employer to contribute to a trust fund in the month following an employee's termination, transfer to a non-union position or opt-out; assuming that the collective bargaining agreement was ambiguous, based on uncontradicted evidence of industry practice requiring reporting hours that month, coupled with eligibility depending on hours worked in previous month. *Trs. Of the Nw. Metal Crafts Tr. Fund v. Sweed Mach., Inc.,* 2015 U.S. App. LEXIS 12576 (9th Cir. July 21, 2015).

82. A district court properly granted summary judgment against a former employee's race discrimination claim based on his termination, because the employee did not offer any evidence of similarly situated persons of a different race that the Navy treated more favorably; instead the employee was on probation and the Navy disciplined other non-probationary employees for similar misconduct. The district court properly granted summary judgment against the former employee's race discrimination claim based on his non-selection for two positions, because the employee did not offer any evidence of the qualifications of individuals selected for one position, and the Navy presented unrebutted evidence that it did not fill the other position. The district court erroneously granted summary judgment against the employee's disability discrimination claim, because the employee offered his own and others' testimony showing that his specific health condition and artificial hip limited his walking ability and evidence that he told his supervisors his legs got tired from walking and he needed a cart to get around. The district court erroneously granted summary judgment against the employee's retaliation claim, because his requests for accommodation were protected activity within four months of his termination. *Scott v. Mabus*, 2015 U.S. App. LEXIS 12530 (9th Cir. July 21, 2015).

83. A district court properly granted summary judgment that the administrative exemption from overtime covered an insurance company's claims adjusters, based on the undisputed facts regarding the duties they actually did and the employer expected them to do. *Bucklin v. Zurich Am. Ins. Co.*, 2015 U.S. App. LEXIS 12497 (9th Cir. July 20, 2015).

U.S. District Court

84. An individual employed as a member of the Hawaii Air National Guard could not bring a Tide VII of the Civil Rights Act claim based on the decision to grant him re-enlistment for one year instead of six years. *Terry v. Hawaii Air National Guard*, 2014 U.S. Dist. LEXIS 143468 (D. Haw. Oct. 8, 2014).

85. Court issued detailed findings and conclusions regarding pattern and practice of discrimination, harassment and retaliation against Thai workers by Global Horizons, Inc. and Maui Pineapple Company, Ltd. And awarded damages and injunctive relief against those companies. *EEOC v. Global Horizons,* 2014 U.S. Dis. LEXIS 175851 (D. Haw. Dec. 19, 2014).

86. Former employees claim that she relied on decedent's promise that she would receive a $2,500 salary for the rest of her life or until her voluntary retirement stated a claim for breach of contract against companies that were also allegedly her employer. *Du Preez v. Banis*, 2015 U.S. Dist. LEXIS 11129 (D. Haw. Jan. 30, 2015).

87. Employee's allegations that he "suffered a work related injury which developed into a disability and that "the disability relates to hip injuries and bilateral hip replacements" did not sufficiently plead a "disability" and therefore failed to state disparate treatment or failure to accommodate claims under the ADA Workers compensation exclusivity barred employees intentional infliction of emotional distress claim. Employee's allegation that his supervisor wrote him up for having complained about the company's refusal to accommodate his disability sufficiently stated an ADA retaliation claim. *Lambdin v Marriott Resorts Hospitality Corp*., 2015 U.S. Dist LEXIS 6631 (D. Haw. Jan. 21, 2015).

88. Court properly instructed jury deciding former employee's co-worker harassment claim that "[a]n employer which investigates and reasonably concludes that no hostile work environment occurred is not liable for a hostile work environment, even if that conclusion was mistaken. However an investigation that is rigged to reach a predetermined conclusion or otherwise conducted in bad faith will not satisfy the employer's remedial obligation." Court properly instructed jury deciding former employee's retaliation claim that the employee must show: "the employer subjected the [employee] to an adverse employment action, that is, the employer required her to sign a statement that she was not sexually harassed, when the employer knew the statement was untrue," because requiring an employee to sign a statement that the employer believes is true is not an adverse employment action. Even if the instruction was wrong, the jury did not reach the question because it did not find the employee engaged in any protected activity. Court properly admitted evidence of investigation by agency and state court proceedings regarding former employee's harassment claim with limiting instruction that jury could consider that evidence for the purpose of deciding whether the employer acted reasonably but not for the purpose of deciding whether sexual harassment occurred. *Marugame v. Johnson*; 2015 U.S. Dist. LEXIS 2004 (D. Haw. Jan. 8, 2015).

89. Court granted summary judgment against former employees racially hostile work environment claim, because evidence showed that the defendant engaged in conduct typical of any employer, such as conducting performance reviews, asking the employee to attend meetings on t.ime and issuing formal admonishments and reprimands for conduct that was not satisfactory, and former employee did not link any of that conduct to former employee's race. Court granted summary judgment against former employee's retaliation claim, because she did not offer any evidence linking her filing an EEO complaint with management admonishing and reprimanding her and denying her request for accommodation and management had legitimate reasons for these actions." Court granted summary judgment against former employee's disability discrimination claim because her physician's letter and allegations did not show that she had an impairment that substantially limited her ability to work or needed to be accommodated or that a disability motivated the employers adverse actions against her. Court granted summary judgment against employee's failure to accommodate claim because she did not show that she was disabled and because she did not adequately participate in the interactive process to evaluate her request for a reasonable accommodation by providing additional information requested in order to evaluate her request. *Spillane v. Shinseki*, 2015 U.S. Dist. LEXIS 650 (D. Haw. Jan. 6, 2015).

90. Employee could not claim wrongful discharge in violation of public policy based on his alleged work injury related discharge, because Haw. Rev. Stat Section 378-32 already provided a remedy for that claim. The remedy did not have to be “sufficient”; only available. The employee could not claim negligent or intentional infliction of emotional distress based on his discharge, because workers compensation was the exclusive remedy for that claim. *Davis v. Lowes HIW Inc*., 2015 U.S. Dist. LEXIS 18862 (D. Haw. Feb. 17, 2015).

91. Employer lawfully withdrew conditional offer of employment, because employee's convictions for felony assault, harassment and assault in the third degree were rationally related to the duties and responsibilities of the receiver/stocker position that had been offered, which had built in stresses of a job requiring interaction with numerous people while under time pressure. *Williamson v. Lowe’s HIW*, 2015 U.S. Dist LEXIS 13170 (D. Haw. Feb. 4, 2015).

92. The Department of Education was entitled to summary judgment against a teacher's disparate treatment gender discrimination claim, because she did not show that she suffered an adverse action (i.e. investigation of her complaints against students was appropriate and complete, investigation of the students' complaints against her found that she engaged in inappropriate behavior and neither investigation materially affected her terms, conditions or privileges of employment) or that there were any similarly situated individuals outside her protected classification. The DOE was entitled to summary judgment against the teacher's sexually hostile work environment claim because the handful of incidents involving offensive language and insubordination by students spanning several years was the sort of conduct teachers were frequently subjected to and not sufficiently severe or pervasive. The DOE was entitled to summary judgment against the teacher's retaliation claim because she did not show that she suffered an adverse action. *Campbell v. State of Haw. Dept. of Educ*., 2.015 U.S. Dist. LEXIS 46992 (D. Hawaii April 10, 2015).

93. Before suing an employer; the EEOC must inform the employer about the specific discrimination allegations; describe what the employer has done and which employees (or class of employees) have suffered and try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. *Mach Mining LLC v. Equal Employment Opportunity Commission*, 2015 U.S. LEXIS 2984 (April 29, 2015).

94. An employer of a cleaning subcontractor was not a third party beneficiary to an agreement between a hotel and a cleaning subcontractor stating that it would pay fates provided by the hotel's collective bargaining agreement, given the provision in the agreement between the cleaning subcontractor and the hotel that there were no third party beneficiaries to the agreement. *Balboa v. Haw. Care and Cleaning, Inc*., 2015 U.S. Dist. LEXIS 556154 (D. Hawaii. April 28, 2015).

95. The U.S. may seek injunctive relief against the airport division for failing to correct sexual harassment by a former employee and retaliating against the complainant, and the court may award that relief if the plaintiff shows that the supervisors and managers may engage in similar behavior again. *U.S. v. State of Hawaii and State of Hawaii Dept. of Transp. Airports Div.,* 2015 U.S. Dist. LEXIS 61199 (D. Haw. May 11, 2015).

96. An employer was entitled to summary judgment against a former employee's disparate treatment race and sex discrimination claim. The employee failed to make a prima facie case, because he did not show that he performed his work satisfactorily even though he did not report to work, or that he suffered an adverse employment action by being investigated without being disciplined, by not being moved to a preferable office, by not being provided better furnishings or by having a subordinate being removed from his supervision. The employee failed to show that the reasons articulated the employer for taking those actions were pretextual. The employer was entitled to summary judgment against the employee's hostile work environment claim, because the actions the employee complained about were not ongoing or persistent enough or tied to his race or sex. The employer was entitled to summary judgment against the employee's retaliation claim, because the actions the employee complained about were not likely to deter a reasonable employee from engaging in protected activity and there was no evidence that they were connected to any protected activity. The employer was entitled to summary judgment against the employee's disability discrimination claim, because the employee did not show that his leg and ankle injury was a disability or that he could have performed the essential functions of his position with accommodation despite his lengthy absence. The employer was entitled to summary judgment on the employee's claim that the employer discharged him solely because of his work injury, because the employee did not indicate what evidence would show that he was discharged solely because of a work injury, was capable of work that the employer had available or had suffered a work injury. The employee's aiding and abetting claim failed because he did not allege who individual aided or abetted or what actions he took to do that. *McAllister v. U.S. Veterans Initiative,* 2015 U.S. Dist. LEXIS 63526 (D. Haw. May 14, 2015).

97. A plaintiff failed to state a claim that an individual majority owner, CEO and President was the alter ego of a LLC employer. Although the plaintiff alleged facts which if true could show a unity of interest between the individual and LLC (i.e. individual's withdrawal of sums for personal use from the LLC's credit line, shifting of funds to his other companies and allowing his son who was not on payroll to withdraw funds but placing restrictions on managers), the plaintiff did not allege any facts showing that adherence to the separate existence of the LLC would sanction a fraud or promote injustice. The court explained that the plaintiff did not even allege that the LLC was insolvent, that her claims remained against the LLC and that Hawaii courts have been reluctant to disregard the separate entity. The workers compensation statute barred the plaintiff's defamation claim because there was a connection between the alleged injury and incidents of employment. The plaintiff did not allege any special damage resulted from the alleged defamation that was not so connected. Alleged false statements to coworkers and a government agency are not sufficient allegations of publicity to state a claim for false light invasion of privacy. *Hillhouse v. Hawaii Behavioral Health, LLC,* 2015 U.S. Dist. LEXIS 69612 (D. Haw. May 29, 2015).

98. A pro se plaintiff failed to state a plausible basis for his disparate treatment discrimination, retaliation or intentional infliction of emotional distress claims. *Jinadasa v. Brigham Young University,* 2015 U.S. Dist. LEXIS 68052 (D. Haw. May 27, 2015).

99. A claim for a plan administrator's failure to comply with 29 U.S.C. 1132 (c) by not providing a participant or beneficiary required information within 30 days accrues after the 30 days expires and they do not receive it. The six year statute of limitations under HRS 657-1

therefore bars an action filed in 2015 to recover penalties based on a 2004 request. *Reynolds v. Merrill Lynch Basic Long Term Disability Plan*, 2015 U.S. Dist. LEXIS 79730 (D. Haw. June 19, 2015).

100. Workers compensation law bars a negligent infliction of emotional distress claim based on alleged discrimination (except for sexual harassment and abuse). A retired officer walking behind an employee's desk was not sufficiently outrageous to support an intentional infliction of emotional distress claim. *Dowkin v. City and County of Honolulu*, 2015 U.S. Dist. LEXIS 79362 (D. Haw. June 18, 2015).

101. A district court properly granted summary judgment against a former employee's retaliation and hostile work environment claims, because the employ failed to raise a genuine dispute of material fact that the employer took any adverse action against her environment claim, because she could not link any of a manager's conduct to gender based animus and her conflict with him was not sufficiently severe or pervasive. The district court granted summary judgment against the employee's disparate treatment claim, because she could not show 1hat she and a manager were similarly situated or that the employer treated the manager more favorably, and she did not show that the employer's legitimate reasons for terminating her (no longer a good fit, recurring communication problems behavior and disinclination to learn from others) were pretextual. The district court granted summary judgment against the employees retaliation claim because her termination occurred more than four months after her protected activity. *Kulukulualani v. Tori Richard Ltd*, 2015 U.S. Dist. LEXIS 85093 (D. Haw. June 30, 2015).

102. A district court concluded that an employer did not retaliate against an employee's protected complaints by moving him from a private office to a semi public cubicle, because there were legitimate and non-discriminatory reasons for the move including the need for space due to expanding operations, the employee did not need privacy for confidential information like other employees did and he had personality problems that affected his ability to work with others. The district court concluded that the employer retaliated against the employee by denying his request for an authorized absence, because the absence was for protected complaining activity and there was no legitimate reason for denying the absence. The district court concluded that the employee's supervisor did not create a hostile work environment for the employee by not assigning him work, because the employee could not perform the work due to the personality problems and because it was more work for the supervisor to assign the employee the work than for others to do it. The employer did not deny the disabled employee a reasonable accommodation because he was unable to perform the essential functions of his position (ability to work independently, interact with others, and address complex issues) with reasonable accommodation; lowering expectations for an employee's performance or allowing him to stay home were not reasonable accommodations. Since the employee was responsible for the breakdown in the interactive process, the district court considered any other possible accommodations and concluded that none of them were reasonable. The employer accommodated the employee's need for a reasonably quiet area to work by allowing him to wear headphones. *Yonemoto v. McDonald*, 2015 U.S. Dist. LEXIS 90162 (D. Haw. July 10, 2015).

103. The Hawaii workers compensation law was the exclusive remedy for the former employees' claims against their employer based on alleged negligent training, negligent

retention, failure to investigate and negligent infliction of emotional distress. *Dowkin v. City and Cty of Honolulu,* 2015 U.S. Dist. LEXIS 90161 (D. Haw. July 10, 2015).

104. A district court granted an employer's motion to compel an employee to arbitrate his discrimination claim, because the employee digitally signed the arbitration agreement (despite his claim that he did not read it), the parties' mutual assent to arbitration provided bilateral consideration, it could not be said with positive assurance that the arbitration agreement was not susceptible as an interpretation that covered the dispute and the National Labor Relations Act did not invalidate the agreement, at least when the employee had an opportunity to opt out of it. *Williams v. 24 Hour Fitness, USA Inc*., 2015 U.S. Dist LEXIS 88782 (D. Haw. July 8, 2015).

Hawaii Supreme Court

105. The circuit court erred when it granted the employer's motion for summary judgment with respect to the employee's claim under Hawai'i Revised Statutes § 378-2. § 378-2.5 generally allows employers to deny employment based on an applicant's conviction record, so long as the conviction record bears a rational relationship to the duties and responsibilities of the position. However, the employer failed to establish any rational relationship between the core duties of a radiological technician, including handling patient charts, and the plaintiff's prior drug conviction. Genuine issues of material fact exist with respect to whether a rational relationship exists between the employee's drug conviction and the risk that vulnerable patients might be sold an illegal drug. *Shimose v. Hawai'i Health Systems Corp.*, 134 Hawai'i 479, 345 P.3d 145 (January 16, 2015).

106. An employer did not offer *admissible* evidence that discrimination did not cause the adverse action against an applicant. It did not show it relied on a legitimate non-discriminatory reason that related to the ability of the applicant to perform the work lit, in question and applied equally to all applicants. It rejected the applicant based on preferred qualifications, and undermined those qualifications by other facts or statements. It did not disclose the required qualifications beforehand. It did not rule out the possibility that it treated applicants with similar qualifications differently, before or later during the same year. *Adams v CDM Media USA, lnc.*, 2015 Haw. LEXIS 47 (Feb. 24, 2015).

107. A former employer was entitled to enforce an arbitration agreement against a former employee, because the agreement covered employment disputes and the employer and it provided the employee an option to opt out of arbitration which she did not exercise. *Hopkins v. Macy's West Stores, Inc.,* 2015 Haw. App. LEXIS 239 (May 21, 2015).

108. ERISA preempted a claim by former union officer and mutual aid fund administrator seeking that the union indemnify him against liability for breaching his fiduciary duty for negligently making loans from the fund to a startup company located in Florida and the attorney's fees and costs he incurred to unsuccessfully defend against that liability. *Rodrigues v. United Public Workers,* 2015 Haw. LEXIS 114 (May 27, 2015).

109. A developer could not enforce an arbitration agreement against homeowners, because the agreement was ambiguous as it conflicted with the provision of a related document stating that

venue would be in circuit court. The arbitration agreement was procedurally and substantively unenforceable, procedurally because it was drafted and offered by the stronger of the contracting parties on a take this or no other basis and buried in a separate document, substantively because it (1) effectively precluded all discovery, (2) eliminated rights to punitive exemplary and consequential damages; (3) required that all claims and underlying facts be kept secret and (4) imposed a one-year statute of limitations. *Narayan v. The Ritz-Carlton Mgmt. Co., Inc.*, 2015 Haw. LEXIS 122 (Haw. June 3, 2015).

110. The circuit court improperly vacated an arbitrator's award granting three officers promotions and back pay, because the award did not exceed the arbitrator's authority under the collective bargaining agreement or conflict with public policy. *State of Haw. Org. of Police Officers and Cty of Kauai*, 2015 Haw. LEXIS 143 (June 20, 2015).

Intermediate Court of Appeals

111. Hotel violated § 481B-4 by neither distributing the entire food and beverage service charge to its employees as tip income nor disclosing the amount it retained as the management share and then used to pay the employees' wages. *Kawakami v. Kahala Hotel Investors, LLC*, 341 P.3d (Haw. Dec. 22, 2014).

112. Employee was not entitled to unemployment benefits because he left employment without good cause by quitting' to accept another job offer that was subject to a background check when he failed. *McElroy v. Pacific Lightner, Inc.*, 2015 Haw. App. LEXIS 50 (Jan. 30, 2015).

113. Circuit Court did not err by affirming an Employment Security Appeals Referee Officer's determination that an unemployment benefit claimant was not able to work because of her caregiving responsibilities for her disabled sister. *Kadota v. Director, State of Haw. Dep't of Labor and Indus. Relations*, 2015 Haw. App. LEXIS 103 (February 26, 2015).

114. The Labor and Industrial Relations Board did not err in concluding that an employee's psychological injury sustained as a result of supervisors accusing him of insubordination since he forget to turn off his computer monitor resulted solely from disciplinary action and his workers compensation claim was therefore barred by HRS § 386-3(c). *Gao v. State of Haw. Dept. of Attorney Gen.*, 2015 Haw. App. LEXIS 194 (April 23, 2015).